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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 272

TRUNKLINE GAS COMPANY,
Petitioner,

v.

HARDIN COUNTY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Respondent, HARDIN COUNTY, presents this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on April 15, 1964.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Texas Constitution, Sections 44, 51, 52, 53 and 55, Article III, are set out in Appendix B to the Petition. The pertinent statutes are Vernon's Ann. Civ. Stats., Article 6673, 6674n, 6674n-3

and 6674q-4, set out in Appendix B to the petition, and Articles 1436, 1497, 1436b, 6021, 6320, 6327, 6663, 6665, 6666, 6667, 6674a, set out in Appendix A, *infra*, pp. 34-40.

STATEMENT OF THE CASE

To prevent definite hazards to vehicular and other traffic, the highway and the pipeline, since 1949, by maintenance manuals and administrative order, the Texas Highway Department[1] has required that pipelines carrying gas across a state highway be encased for the full width of the right-of-way and vented at each end (R. 28-35). The packed nature of the soil under, and the pressure and weight of vehicular traffic on, a roadway causes unusual stresses on an unencased gas pipeline which may result in damage to the pipeline, cave-ins of the roadway, escaping gas subject to explosion and other hazards, and extensive corrosion by electrolysis. Encasement provides protection to the gas pipeline from the compact soil, weight and pressure of vehicular traffic and electrolysis; prevents leaks, escaping gas and other hazards; provides a passage for the gas to escape to the vents at the right-of-way lines; and eliminates traffic hazards resulting from escaping gas and cave-ins in the roadway by permitting repair of the pipeline without obstructing traffic by cutting the pavement (R. 28, 29, 27, 115, 116).

In 1950, the Department issued written permits authorizing Petitioner to install gas pipelines across U. S. Highway 69 and F.M. Highway 418 in Hardin County, on the condition, among others, that the pipes be placed through a hole bored beneath the highways and an iron casing extending from the right-of-way line to right-of-way line, and

[1] Hereinafter called "Department."

sealed and vented at the ends (R. 186, 88, and 189). Petitioner constructed its line (encased and vented) across each highway (R. 14, 19) and, in 1951, acquired pipeline easements from the owners of the lands abutting the crossing (R. 233-235).

Respondent thereafter undertook to acquire right-of-way to widen each highway, but Petitioner inaccurately states that the Department determined to widen said highways. There is no evidence of an order of the State Highway Commission directing the widening of either highway. In 1955, Respondent contracted with the Department to acquire right-of-way for, furnish and remove all obstructions on F.M. Highway 418 (R. 204, 205). There is no evidence of Respondent contracting to acquire right-of-way for U. S. Highway 69. Except as authorized by contract, the Department could not require Respondent to acquire any right-of-way.

The Department furnished Respondent plats, field notes and right-of-way deeds (naming the grantors) for each parcel of land the Department requested Respondent to acquire (R. 66, 189, 196), but did not furnish Respondent a plat, field notes or a right-of-way deed of Petitioner's easements abutting either highway and did not request Respondent to purchase or condemn Petitioner's easements (R. 66). Pursuant to the requests (plat, field notes and deeds) of the Department, Respondent acquired from various owners all right-of-way necessary for the widenings, including the parcels of land owned by the grantors of Petitioner's easements (R. 66). As Petitioner admits, however, "Respondent made no effort in either instance to purchase or condemn Petitioner's private easements or any right or interest therein" (Petition, p. 5). Petitioner is still using its easements, its pipelines were not removed and neither Respondent nor the State of Texas acquired any interest from Petitioner.

While Respondent was acquiring right-of-way for widening the highways, the Department, on several occasions, requested Petitioner to encase and vent its pipelines in the right-of-way acquired to widen the existing highways (not new highways) in accordance with the permits under which they were installed (R. 67, 194, 214). Petitioner repeatedly refused to comply with the request unless assured reimbursement for its actual cost (R. 15, 20, 197, 219).

The sole basis of Petitioner's statement that the Department considered an uncased pipeline an obstruction is the testimony of local engineers that, from an engineering point of view, anything in the way of construction or maintenance was an obstruction, and that such conclusion was simply an engineer's attempt to interpret Respondent's contract (R. 86, 104, 115). Similarly, there is no basis for Petitioner's statement that the Department officials considered that Respondent had the responsibility to compensate for casing its pipeline. Local engineers attempted to so interpret Respondent's contract, but admitted that they would not state Respondent owed Petitioner reimbursement, but only that reimbursement would not come from the State (R. 83-87, 101-105, 115, 125-127).

The "officials" did not refer the matter of compensation to Respondent. A local engineer wrote Petitioner that, as to the question of reimbursement, the State could not help, as "the clearing of right-of-way is a matter handled by the County" (R. 199), and local engineers refused to testify that they had even referred Petitioner to Respondent. (R. 117-118, 126-127). After Petitioner's repeated refusals, Respondent's County Judge entreated Petitioner to comply with the Department's request. (R. 200, 227). Petitioner replied that it realized that Respondent was "not responsible for the specification that the highway in question be

cased", but that it would not commence casing until informed it would be reimbursed (R. 202-204). Respondent then passed an order stating that Petitioner "is authorized to extend the casing of their pipelines across U. S. Highway 69 at county expense" (R. 149).

The County Judge advised Petitioner that it was the County's contention that payment for extended casing on F.M. Highway 418 would be illegal and, following Petitioner's reply arguing that Respondent had authority to pay for the casing (R. 226-227), Respondent passed an order that it would pay "according to law all legal claims affixed against it, for the casing" of pipelines across State Highways (R. 228).

Following each order, Petitioner encased its pipelines as requested by the Department (R. 205-207, 227-230). Respondent refused to reimburse Petitioner and Petitioner filed this suit. Motions for Summary Judgment were filed by both parties, and the District Court, filing findings of fact and conclusions of law (R. 64-71), granted the motion of Petitioner and denied Respondent's.

The Court of Appeals concluded that Respondent did not have power to pay Petitioner to case its lines because (1) the Texas Highway Department has exclusive control of, and power and duty to construct and maintain state highways, (2) no funds of a Texas county can be expended for the construction or improvement of a state highway, (3) county funds may be expended only for the purpose of acquiring right-of-way, and (4) the extension of casing on a pipeline is incidental to construction and not to acquisition of right-of-way. Accordingly, the court reversed the dictrict court judgment and remanded the cause with directions that judgment be entered for Respondent. 311 F. 2d 882.

Without reaching the merits, this Court granted Petitioner's Petition for Writ of Certiorari, vacated the judgment and remanded the cause for the Court of Appeals to consider a new statute. Acts 1963, 58th Leg., Ch. 240, P. 654; Vernon's Ann. Civ. Stats., Article 6674n-3.

Upon remand, Petitioner contended that the new statute validated the questioned contracts. Respondent urged that (1) Petitioner's construction of Section 2 of the new statute rendered it void, and (2) Petitioner's construction of the section was erroneous. On April 15, 1964, the court rendered an opinion concluding that Petitioner's construction would violate the Texas Constitution and holding:

> "In addition to its contention that the Legislature could not validate and authorize the payment of funds in question here, appellant insists that the Legislative Act does not in terms or in effect purport to do so. The act is general and neither expressly nor impliedly deals with the situation involved in this case, and we are of the view that, since the statute would be so clearly unconstitutional if construed as an attempt to validate the questioned contracts, it is our duty to construe the statute as not intending to effect an unconstitutional result."

REASONS FOR DENYING THE WRIT

I.

THE PETITION DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

A. No Question on the Court of Appeals' Construction of Vernon's Ann. Civ. Stats., Article 6674n-3 is Presented

After concluding that Petitioner's construction of Article 6674n-3 would violate the Texas Constitution, the Court of

Appeals held that the statute "is general and neither expressly nor impliedly deals with the situation involved in this case". The only question relating to the second decision presented by the Petition is whether the statute "is void under the Texas Constitution". The "Questions Presented" do not seek review of the Court of Appeals' construction of the statute. The meaning of the statute is a primary question not a subsidiary question fairly comprised within the question of the validity of the statute. Rule 23, Supreme Court Rules. The latter question is not reached until after the meaning of the statute has been determined. By the limited review sought, Petitioner requests the court to deviate from the traditional practice of avoiding a constitutional question when the record discloses another ground of decision, *Neese* v. *Southern Railway Company*, 350 U.S. 77 (1955), and only considering questions raised in the "Questions Presented". *J. I. Case Company* v. *Borak*, 84 Sup. Ct. 1555 (1964).

B. The State Constitutional Question is Episodic

The statute purports to validate all contracts "heretofore made". A validating act is necessarily retroactive, and unlike a prospective statute, the question of its validity does not recur. Special and important reasons for granting a writ reach beyond the episodic. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). The record does not support Petitioner's assertion that all 254 counties of Texas are affected by the question presented. The evidence does not show that any county other than Respondent has contracts which may be affected by the decision below.

II.

THE DECISION OF APRIL 15, 1964 IS CORRECT

A. The Court of Appeals' Construction of Article 6674n-3

The Court of Appeals held that Article 6674n-3 "is general and neither expressly nor impliedly deals with the situation involved in this case". The situation involves contracts by Respondent to reimburse Petitioner for encasing a pipeline in an area acquired for widening a state highway. Respondent made no effort to purchase or condemn Petitioner's private easements, but, without obtaining any interest in such easements, contracted to reimburse for the cost of the encasement.

The statute does not provide that the cost of adjusting utility facilities *under contracts by counties to pay for such costs* is an expense of right-of-way acquisition, but declares that *in the acquisition of highway rights-of-way* for the Department, such cost is declared to be an expense of the right-of-way acquisition. The title of the Act expresses the same purpose.[2]

Payment of the cost of utility adjustments as an incident of *acquiring the utility's easement* (acquisition of right-of-way) is not payment of the cost of a utility adjustment under a contract providing for that alone. The Department did not request Respondent to purchase or condemn Petitioner's easements or to acquire right-of-way from it in any way, and Respondent made no effort to acquire easements or right-of-way (R. 66). The terms of the statute are not applicable to these facts. Section 2 provides that contracts made by counties "for the purposes stated above"

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[2] "An Act providing that in the acquisition of right-of-way by or for the Texas Highway Department, the cost of relocating or adjusting eligible utility facilities shall be treated as a right-of-way cost".

are ratified and validated. The only purpose "stated above" is the acquisition of highway rights-of-way. Section 1 makes no reference to a contract relating solely to the payment of the cost of utility relocation or adjustment.

The statute is only applicable to the cost "of relocating or adjusting utility facilities". Petitioner's pipelines were neither relocated nor adjusted. Petitioner encased the pipelines and they remain in the same location. The pipelines were neither raised nor lowered — merely encased.

The only cost declared to be an expense or right-of-way acquisition is that "which . . . may be eligible under the law". Petitioner ignores this requirement and does not even suggest what costs are eligible under the law. The only reference in a previous Texas statute to costs being eligible is in Vernon's Ann. Civ. Stats., Article 6674w-4, providing that relocation of a utility on an interstate highway shall be made "at the cost and expense of the State of Texas provided that such relocation is eligible for Federal participation". *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960). The highways here were not a part of the Interstate Highway System. Nothing in Article 6679n-3 or any other statute, declares that contracts of the character of Petitioner's involve a cost "eligible under the law". Since Vernon's Ann. Civ. Stats., Article 1436b[3] requires a utility to relocate its pipes on new right-of-way at its own expense, Petitioner's cost is not "eligible under the law".

The statute purports to validate eligible costs of relocation and adjustment made in connection with "the acquisition" of rights-of-way by a county. Inasmuch as Respondent did not seek to acquire right-of-way or adjustment, and the cost is not eligible, the Court correctly held that the statute

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[3] Appendix p. 30.

neither expressly nor impliedly deals with the situation involved here.

B. Petitioner's Construction of Article 6674n-3 Renders Section 2 Void

Recognizing that its first opinion held that the contracts were *void*, the court below held that a statute attemping to validate these contracts made without authority of law would conflict with Section 53 and 52, Article III, Tex. Const. The court did not suggest conflict with Sections 44, 51, and 55, Article III; it noted that, to be properly understood, Sections 52 and 53 must be considered with the latter sections.

Finding no controlling decisions construing the provision of Section 53 prohibiting the Legislature from authorizing payment of any claim created against a county "under any agreement or contract, made without authority of law",[4] the court turned to authorities construing Section 44. These decisions, which are reviewed in the opinion, manifest that if Article 6674n-3 is construed as attempting to validate Petitioner's contracts, it is an authorization to pay a claim created under a contract made without authority of law.

The Court correctly noted that by its express terms Section 53 does not become effective until after the event giving rise to a controversy. The prohibition on the Legislature does not apply until *after* a county has made a contract without authority of law. Just as a new constitutional provision may prohibit ratification of a contract by depriving the Legislature of the power to initially authorize such contract, the proscription in Section 53 intervenes between

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[4] Section 53 "places similar restrictions on the Legislature with respect to counties and municipal corporations as is placed by Section 44, Article III, on the State as to State officers and contractors and State claims". Interpretative Commentary, Vernon's Tex. Const., Vol. 1, p. 736.

the making of a county contract and attempted validation by the Legislature. In the former instance, the Legislature is deprived of the power of ratification, *Katzenberger* v. *City of Aberdeen,* 121 U.S. 172 (1887), and *Armstrong* v. *Walker,* 73 S.W. 2d 520 (Tex. Sup. 1934), and an intervening constitutional provision depriving the Legislature of the power to initially authorize an act is indistinguishable from one prohibiting ratification. Section 53 was not adopted in the interim between the making of the contracts and the attempted ratification, but by its express terms *it became a limitation on the power of the Legislature during such interim.* It would be anomalous, indeed, to hold that a new constitutional provision curtailing initial authority is superior to an existing constitutional provision which can only apply after the making of a contract without authority of law. As the court below stated, in either event the Legislature is deprived of the power to ratify.

Petitioner's answer is an accusation that the court below erred in *equating* Section 53 with Section 44, and argument (in effect) that Section 53 is meaningless. To acquiesce in this accusation, the court would admit plagarism; the Texas Constitutional Convention of 1875, not the court below, evolved this equation.

Petitioner's insistence that Sections 44 and 53 are not equivalent because "the word 'pre-existing' does not appear in Section 53" argue that the Convention adopted a meaningless provision. Section 53 prohibits the Legislature from authorizing payment of any claim created against a county "under any agreement or contract, made without authority of law." Such a claim is one on a contract not provided for by pre-existing law. There is no magic in the word "pre-existing". The meaning of Section 53 is not changed if the word "pre-existing" is added. Prohibition of payment

under a contract "made without authority of law" necessarily prohibits payment under a contract "made without authority of pre-existing law". A law is pre-existing if it is in effect at the time a contract is made. If a contract is "made without authority of law", it is not authorized by pre-existing law. Under Petitioner's argument, Section 53 would be meaningless because there would be no situation or set of facts to which is could apply.

Petitioner also argues that there can be no issue of donation of public funds in violation of Section 52, because there was no obligation on the part of Petitioner to encase its pipelines. This is beside the point. Unless the contracts were made with authority of law, Respondent had no obligation to pay Petitioner, and its payment would be a donation of public funds. Use of public money to pay a claim predicated on facts which generate no liability constitutes a gift. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960).

Unless Sections 53 and 52 are nullities, the Court of Appeals correctly held that Petitioner's construction of the statute violates their prohibitions.

C. The Decision Does Not Conflict with Applicable State Law

The petition fails to show that the Court of Appeals "decided an important state . . . question in a way in conflict with the applicable state . . . law". Rule 19, Supreme Court Rules. Petitioner cites no decision of a Texas court which conflicts with the decision upon "the precise issue of state law involved", *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960), or upon the "precise statute" before the Court of Appeals, *Propper* v. *Clark*, 337 U.S. 472 (1949).

Most of the authorities cited by Petitioner deal with validation of the irregular political proceedings (incorporation, annexation, elections, etc.), not attempts to create an obligation under contracts made with authority of law, and with the exception of *Henson*,[5] none of the cases construe Section 53. As does *Henson*, several of the cases involve specially created districts and not counties or cities.

Contrary to Petitioner's assertion, *Henson* does not involve a situation "where the county's road bonds had been void when issued but had been validated by subsequent curative statutes". Henson sued "to enjoint the collection of" a tax levy by "Road District No. 13 of Henderson County". The district urged a validating act, and the court held that Section 53 "has no application to the subject under consideration". A tax levy of a road district, not a contract of a county, was the subject under consideration.

The prohibition of Section 53 only applies to "any county or municipality of the state, under any . . . contract". A road district is neither a county nor a municipality, and a tax levy is not a contract. Neither the Constitution of 1876 nor any prior constitution recognized any political subdivisions other than counties, cities and towns, and school districts. The Constitution of 1876, Articles IX and XI, manifest that the words "county or municipality" designate the political subdivision of the state recognized in 1876. *Welch* v. *State*, 148 S.W. 2d 876, 879 (Tex Civ. App. 1941, error ref.). Road districts were unknown in Texas until the amendment of Section 52, Article III, Constitution of Texas, in 1904. The object of this amendment was to broaden "the former restrictive powers of the Legislature" by authorizing the formation of districts composed of counties, or any number of adjoining counties, o · to any

[5] *Henson* v. *Commissioners Court of Henderson County*, 56 S.W. 2d 240 (Tex. Civ. App., 1932, error ref.)

political subdivision of the state, or defined territory, for the purpose of promoting the development of the state. *Simmons* v. *Lightfoot*, 146 S.W. 871, 872 (Tex. Sup. 1912).

Road District No. 13 of Henderson County was a "defined district within Henderson County, and not a county or political subdivision thereof. A "defined district" is a defined area in a county, less than the county, other than a political subdivision of a county. *Browning* v. *Hooper*, 260 U.S. 396 (1926); *Bell County* v. *Hines*, 219 S.W. 556, 557 (Tex. Civ. App. 1920, error ref.); Tex. Special Laws 1926, 39th Leg., 1st C.S. p. 920, Ch. 319. Since Road District No. 13 was "a defined road district" and not a county or municipality, the court correctly held that Section 53 did not apply to the subject under consideration. In refusing the application for writ of error, the Texas Supreme Court did no more than approve the holding that Section 53 does not apply to an act validating a tax levy of a defined road district.

Recognizing that neither *Henson* nor other decisions cited by Petitioner are authoritative on the issue of whether an act validating a contract of a county made without authority of law contravenes Section 53, the Court of Appeals[6] turned to decisions construing Section 44 for authoritative interpretation of Section 53. Petitioner's specious argument that Section 53 does not contain the word "pre-

[6] The Court of Appeals is composed of three judges who are constantly required to pass upon the law of Texas, including Judge Joseph C. Hutcheson, a judge with many years' experience in applying Texas law in the Court of Appeals and District Court. In the absence of a state decision deciding "the precise issue of the State law" or "construing the relevent" state statute, this Court will leave undisturbed the interpretation placed upon purely local law by a court so composed. *Spiegel's Estate* v. *Commissioner of Internal Revenue, supra; McGregor* v. *State Mutual Life Ass. Co.*, 315 U.S. 280 (1942); *United States* v. *Durham Lumber Company, supra.*

existing" does not show that the holding is "unreasonable" or clearly erroneous and "unreasonable". *United States* v. *Durham Lumber Company, supra.* The holding below is supported by reasonable argument, and if "reasonable argument can be based on [State] cases to support a determination" of the question "either for or against the Petitioner", the decision will be upheld. *Spiegel's Estate* v. *Commissioner of Internal Revenue,* 335 U.S. 701 (1949).

III.

THE DOCTRINE OF ABSTENTION IS INAPPLICABLE

Petitioner presents "no exceptional circumstances justifying abstention". *County of Allegheny* v. *Frank Meshuda Company,* 360 U.S. 185 (1959). No Federal question is presented and application of the doctrine has been limited to situations where an authoritative state decision may avoid a Federal question. *City of Meridian* v. *Southern Bell T. & T. Co.,* 358 U.S. 639 (1959); *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959); *Martin* v. *Creasy,* 360 U.S. 219 (1959).

IV.

THE FIRST DECISION IS CORRECT AND DOES NOT CONFLICT WITH APPLICABLE STATE LAW

The Court of Appeals concluded that Respondent did not have power to pay Petitioner to encase its pipelines because (1) the Department has exclusive control of and power and duty to construct and maintain State Highways, (2) no funds of a Texas county can be expended for construction or improvement of a State highway, (3) county funds may be expended only for the purpose of acquiring

right-of-way and (4) the extension of casing on a pipeline is not incidental to acquisition of right-of-way but to construction, 311 F. 2d 882.

These holdings are not, as Petitioner claims, based solely on a construction of Vernon's Ann. Civ. Stats., Articles 6674n and 6674q-4, and *Sinclair Pipeline Co.* v. *Archer County*, 147 F. Suppl. 650 (N.D. Tex. 1956), affirmed 245 F. 2d 79, 5th Cir. 1957). The opinion evidences that the holdings rest upon a review and analysis of Texas cases defining the limited power of a county; the basic legislation creating the Department and defining its powers; all statutes relating to State Highways; Texas decisions construing such basic legislation and supplementary statutes; the *Archer County* case (and "the force and effect of Texas statutes and decisions cited in and made the basis" of such case); and other authorities cited in Respondent's brief below.

The express language of Vernon's Ann. Civ. Stats., Article 6673, 6674n and 6674q-4 requires that all improvement and construction of State highways be paid out of the State Highway fund and prohibits the counties of Texas from paying any money except for the acquisition of right-of-way. In determining that the agreement to pay Petitioner to ease its pipelines was not incidental to acquisition of right-of-way but to construction and improvement of the highway, the Court below considered *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup., 1960). The State contended that Vernon's Ann. Civ. Stats., Article 6674w-4 (providing for reimbursement out of highway funds for relocation of utilities necessitated by construction of an interstate highway) violated Tex. Const. Article VIII, § 7a,[7] in

[7] This provision prescribes that certain funds "shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining and policing" public roadways.

that the cost of relocating a utility was not part of the cost of "constructing" a highway. With the point squarely presented "that utility relocation expense is not part of the cost of highway construction" the Court held "that the same is properly attributable to highway construction within the meaning of the Constitution."

Since Petitioner sought to recover only the cost of encasement and did not seek to recover the market value of its easements, the Court below also considered the well-settled law of Texas that the measure of damages for a taking is the market value of the property taken and not the cost of adjustment. *Chicago R.I. & G. R.R. Co.* v. *Tarrant County Water Control & Improvement District*, 73 S.W. 2d 55 (Tex. Sup. 1934); *Gulf C. & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897). Respondent made no effort to purchase or condemn Petitioner's easement.

After the first decision, Petitioner discovered Vernon's Ann. Civ. Stats., Article 6674c-1 and now urges that it authorizes a Texas county to make voluntary contributions to the department for the development of "highways in each county". This statute does not authorize a county to contribute to the development of State highways, but to "public roads of such county". Under Vernon's Ann. Civ. Stats., Chapter 2, Title 116, Texas counties still establish and maintain *county roads* which are not a part of the State highway system. Vernon's Ann. Civ. Stats., Article 6667 authorizes the Department to render assistance to counties with reference to public roads, and Article 6674c-1 was enacted to provide a means for counties to contribute funds to the Department to be used in the development of *County roads, not State highways.*

Clark v. *Greer*, 232 S.W. 2d 876 (Tex. C.A. 1950) does not determine "that what may be done indirectly through the Highway Department, may also be done directly by the county . . . involved". *Clark* approves a conveyance by a *city* to the Highway Commission but expressly notes that the question of the city's power to condemn a right-of-way for a State highway was not considered. Since the application of the statute is limited to "any county or political subdivision of any county in this State" *Clark* unnecessarily and erroneously cites the statute. A Texas city is a political subdivision of the State — not of a county. *Supreme Forest Woodmen's Circle* v. *City of Belton*, 100 F. 2d 655 (C.C.A. 5, 1938); *Ex parte Ernest*, 136 S.W. 2d 595 (Tex. Crim. App., 1940); *Cofield* v. *Britton*, 109 S.W. 2d 493 (Tex. C.A. 1908, err. dism.).

There is no question of implied repeal of Article 6673 by either of Articles 6674n, 6674q-4 or 6674c-1. The latter statutes are consistent in the limitation that no county funds may be expended on a State highway except for acquisition of right-of-way, and by its own terms Article 6674c-1 is inapplicable to State highways.

Petitioner urges conflict with *McLennan County*, *Sinclair Pipeline Co.*, and *Magnolia Pipeline Co.*[8] Neither *McLennan County* nor *Sinclair Pipeline Co.* construes the statutes considered or decides the precise question in issue. The question of whether an agreement to pay for casing a gas pipeline is an incident of construction or an incident of acquisition of right-of-way was neither raised nor decided. Each involved the lowering of a pipeline, not encasement.

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[8] *McLennan County* v. *Sinclair Pipeline Co.*, 323 S.W. 2d 471 (Tex. Civ. App. 1955, error ref. n.r.e.); *Sinclair Pipeline Co.* v. *State*, 332 S.W. 2d 58 (Tex. Civ. App. 1959); *Magnolia Pipeline Co.* v. *City of Tyler*, 348 S.W. 2d (Tex. Civ. App. 1961, error ref.)

Sinclair Pipeline Co. is a condemnation suit in which the county sought and obtained a judgment condemning "an easement of right-of-way". During required negotiations for the purchase of the company's easement, the company lowered and encased its pipeline upon agreement for reimbursement. The Court of Civil Appeals reversed the trial court judgment awarding no damages, holding that since, by the condemnation suit, the company's easement had been taken, the measure of damages was the cost of adjustment. Having initiated condemnation proceedings, the county could not deny its power to condemn, and Sinclair did not question, but conceded that right. Under the record, no question as to the power of the county under the applicable statutes could have been presented.

Only lowering, not casing, a pipeline is involved in *McLennan County*, and none of the statutes applicable here are even cited. The case relies heavily upon *Sinclair Pipeline Co.* without recognizing the fundamental differences in a condemnation suit and the suit presented. Contrary to Petitioner's assertion that the court "refused to follow the federal courts' holding in the Archer County case", the court misconstrued *Archer County* and followed its own misconstruction. The court states that "the Archer County case holds . . . that Sinclair's easement was in that case taken" and that "the Archer County case is not contrary to the foregoing but actually supports the result herein reached". *Archer County* held that Sinclair's easement was *not* taken, and if the applicable statutes had been presented in *McLennan County*, *Archer County* would not support the court's holding. No issue as to the power of a county to pay for lowering a pipeline on a state highway being presented, the court disposed of the case on the assumption that the county had such power.

Magnolia Pipeline Co. does not hold "that counties and cities in Texas may be required to compensate for adjustments of pipelines crossed by new streets or highways and, therefore, have power to do so." The case holds that a *city* which uncovered pipelines while cutting and grading one street and "attempting to pave very near" a pipeline on another street, is liable for the cost of lowering and encasing of such pipelines because the necessity for such adjustments resulted from the street improvement. No question of the taking of an easement was involved because the city street had been placed over the easement several years prior to the paving project prompting the suit. This case decides issues relating to a city, not a county; a city street, not a state highway; improvement of a city street; not acquisition of right-of-way for a state highway. Liability was based upon the results of improving streets; the statutes governing counties and highways were not construed; and the precise issue here was not decided. The precise issue was more nearly involved in *State* v. *City of Austin, supra*, and the Texas Supreme Court held that relocation expense was a part of construction.

If the decision below had been that of a Texas intermediate court, the Texas Supreme Court would not have had jurisdiction to review it on the ground of conflict with *Sinclair Pipeline Co., McLennan County*, or *Magnolia Pipeline Co.* Vernon's Ann. Civ. Stats., Article 1728, authorizes the Supreme Court to review a decision of a Court of Civil Appeals when "one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals . . . upon any question of law material to a decision of the case." Decisions are not in conflict unless they are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other". *Dockum* v. *Mercury Ins. Co.*, 135 S.W. 2d 700 (Tex.

Sup. 1940). Petitioner here seeks review upon the ground of conflict when there is not a conflict under state law which would vest jurisdiction in the Texas Supreme Court.

The opinions of the Attorney General are irrelevant and superficial. They assume that a requirement for adjustment of pipelines involves acquisition of right-of-way and do not discuss or rule on the extent of a county's power under the statutes construed by the court below. None of the opinions consider or discuss the relative duties of the Department and counties and the difference between construction and acquisition of right-of-way. Each demonstrates, without recognizing, the difference between acquisition of right-of-way and paying for adjustment of a pipeline, by noting that if a price cannot be agreed upon, the county will have to "condemn the easement" — not condemn the right to lower or case the pipeline. WW-125 points out that the cost of lowering an encasement would not be a separate issue, but would be considered in the general issue of the value of the easement taken. Unless an easement is taken, there is no acquisition of right-of-way. Moreover, as evidenced by WW-1090, the opinions recognize no distinction between a county road and a state highway.

V.

ASSUMING CONFLICT, THE COURT BELOW WAS NOT REQUIRED TO FOLLOW McLENNAN COUNTY AND SINCLAIR PIPELINE COMPANY

Petitioner erroneously argues that the court below was required to follow *McLennan County* and *Sinclair Pipeline Co.*, decisions of intermediate courts. The "law of the state" is determined "from all the available data", including decisions of intermediate courts, but where decisions of intermediate courts may be ignored by other courts of similar jurisdiction, the Federal court is not bound by them. *West* v.

American Telephone & Telegraph Co., 311 U.S. 223 (1940); *King* v. *Order of United Commercial Travellers of America*, 333 U.S. 153 (1948).

McLennan County and *Sinclair Pipeline Co.* are without precedential value. The Texas Supreme Court was not requested to review the latter and refused to approve the former by entering the notation, "Refused. No Reversible Error".[9] There are thirteen Courts of Civil Appeals in Texas; the doctrine of stare decisis is not applicable to decisions of these courts, and one court is not bound to follow the decision of another unless it is satisfied with the reasoning.[10] Since a Court of Appeals "adjudicating a state-created right solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the state", *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945), it can have no obligation greater than that of a Texas Court of Civil Appeals. The court below was no

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[9] The precedential value of opinions of Courts of Civil Appeals is determined by the notation of the Texas Supreme Court in refusing to review them. When the notation is "Refused. No Reversible Error", it means, and only means, that the application for writ of error presented no error which required reversal (through omission or otherwise), and does not mean that the Supreme Court approves any holding or the judgment entered. Such cases "are but persuasive only, with little precedential value". Calvert, *The Application for Writ of Error*, 3 Franki. Texas Rules of Civil Procedure 404 (1955); Simpson & Wall, *Problems of Precedent Affecting Courts of Civil Appeals' Opinions*, 4 S.W.L.J. 398 (1950); Simpson, *Notations on Application for Writ of Error*, 12 Texas Bar Journal 547 (1949). Entry of this notation by the Texas Supreme Court, like denial of a petition for writ of certiorari by this Court, "imports no expression of opinion upon the merits of the case". *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844 (1950).

[10] *Calvary Temple* v. *Taylor*, 288 S.W. 2d 868 (Tex. Civ. App. 1956); *General American Life Ins. Co.* v. *Rios*, 154 S.W. 2d 191 (Tex. Civ. App. 1941, reversed on other grounds 164 S.W. 2d 521); *Malone* v. *United States Fidelity & Guaranty Co.*, 9 S.W. 2d 461 (Tex. Civ. App. 1928).

more bound by *McLennan County* and *Sinclair Pipeline Company* than other Texas Courts of Civil Appeals.

The status of a decision of a Texas Court of Civil Appeals is more comparable to the common pleas decision considered in *King, supra,* than opinions of intermediate and lower courts considered in *State of California* v. *Taylor,* 353 U.S. 553 (1957) and *Fidelity Union Trust Company* v. *Field,* 311 U.S. 169 (1940). Like a decision of the court of common pleas of South Carolina, an opinion of the Court of Civil Appeals is not taken in the state as "authoritative expositions of that state's 'law' ", does not exact conformity from the same court or other courts of civil appeals or lesser court, and may be ignored by other courts of civil appeals. As *King* concludes, "it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court".

Irrespective of the precedential value of these cases, there is "persuasive data that the highest court of the state would decide otherwise", *King, supra:* the refusal of the Texas Supreme Court to approve the decisions cited by Petitioner; the decision in *State* v. *City of Austin, supra,* that cost of relocation is an expense of construction; the Texas statutes (none of which was reviewed by such decisions); and the *Archer County* case.

VI.

THE DECISION DOES NOT CONFLICT WITH FEDERAL DECISIONS

None of the Federal decisions cited by Petitioner decides the question of whether encasement of a pipeline is an incident of construction or an incident of acquisition of right-of-way as those terms are used in Texas statutes, or construe any of the Texas statutes or adjudicate the power of a Texas county. While these cases characterize certain

acts as "takings", they actually refer to a damaging. Under Texas law, Petitioner's easements have not been taken, as Petitioner is still using them, and any result from the construction of the highway is a damaging — not acquisition of right-of-way.

VII.

ADDITIONAL GROUNDS PRESENTED TO THE COURT OF APPEALS

In addition to the grounds stated in the first opinion, Respondent presented other grounds which support the judgment and require denial of the writ. *LeTulle* v. *Scofield*, 308 U.S. 415 (1940); *Langnes* v. *Green*, 282 U.S. 531 (1931).

A. Assuming an Agreement to Pay For the Cost of Encasement is Acquisition of Right-of-Way, Conditions Precedent to Vesting Such Power in Respondent Were Not Performed

A Texas county only has such powers as are expressly granted by statute and must exercise such powers in the manner prescribed. When a condition precedent to exercise of a power is imposed, the condition must be performed if the power is to be exercised. *Canales* v. *Laughlin*, 214 S.W. 2d 451 (Tex. Sup. 1948). Precedent to delegating power to a Texas county to acquire right-of-way for a state highway, the State Highway Commission must determine the necessity for acquiring the right-of-way, contract for the county to acquire the right-of-way, request the county to acquire particular parcels and furnish the county plats or field notes and right-of-way deeds of the parcels to be acquired. Vernon's Ann. Civ. Stats., Article 6674n.

A county is authorized to acquire right-of-way only when "in the judgment of the Texas Highway Commission" such acquisition is necessary. There is no evidence that the State

Highway Commission determined that acquisition of right-of-way from Petitioner was necessary. Article 6674n is permissive and does not impose any duty on a county to acquire right-of-way until it has contracted to do so. *Traders' Compress Co.* v. *State*, 77 S.W. 2d 245 (Tex. Civ. App. 1934); *Sinclair Pipeline Company* v. *Archer County*, 245 F. 2d 79 (CCA 5, 1957). Article 6674n charges the Commission with the duty of furnishing the county "plats or field notes of such right-of-way or land . . . *after* which the Commissioners Court may and is hereby authorized to purchase or condemn the same . . . in accordance with such field notes". The Commission did not request Respondent to acquire right-of-way from Petitioner, and although the Commission furnished Respondent plats, field notes and right-of-way deeds (with the name of each grantor) on all parcels of land desired, it furnished none as to Petitioner's easements. The furnishing to a county by the Commission of information necessary to negotiate and condemn is a condition precedent to vesting power to acquire right-of-way. *Sacred Gardens of Memory, Inc.* v. *State*, 334 S.W. 2d 220 (Tex. Civ. App. 1960); *Sinclair Pipeline Company* v. *Archer County, supra.*

A county is "authorized to purchase or condemn" right-of-way "after" it has been furnished this information. The mandate to furnish field notes "for purchase or condemnation" necessarily includes a duty to furnish the name of the grantor. Article 6674n contemplates a purchase, and condemnation if purchase is impossible. It requires the county to follow the procedure of the general condemnation statutes, under which proof, negotiation with the owner is a condition precedent to vesting jurisdiction of a condemnation case in the courts. *City of Houston* v. *Derby*, 215 S.W. 2d 690 (Tex. Civ. App. 1948, error ref.).[11] Until the commis-

[11] By unqualifiedly refusing the writ of error in this case, the Texas Supreme Court adopted the opinion as its own. *Biggers* v. *Continental Bus System*, 303 S.W. 2d 359, 364 (Tex. Sup. 1957).

sion had furnished field notes and the name of the grantor to Respondent, it could not attempt to comply with the statutory condemnation procedure.

The State Highway Commission not having requested acquisition of Petitioner's easements or furnished data necessary for acquisition, the conditions prescribed by the statute were not performed and the power to acquire right-of-way from Petitioner did not vest in Respondent.

B. Petitioner's Encasement Was the Performance of a Legal Duty Assumed as An Incident of Exercising The Privilege of Placing its Pipelines Across State Highways

The Legislature of Texas has plenary power over its highways, may delegate this power to other arms of the State, and may grant ultilities the privilege of crossing highways, *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960), but the power to delegate control of highways and to grant privileges is subject to an important constitutional limitation. Tex. Const., Article I, Section 17, provides in pertinent part:

> "• • • no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

Under the mandate of this section, whether expressed in the statute or not, legislative grant to a utility of the privilege of crossing a highway is subject to the continued control of the state or its arm to impose additional burdens upon the exercise of the privilege. *Storrie* v. *Houston City St. Ry. Co.*, 46 S.W. 796 (Tex. Sup. 1893); *Mayor of City of Houston* v. *Houston City St. Ry. Co.*, 19 S.W. 127 (Tex.

Sup. 1892); *Fleming* v. *Houston Lighting & Power Co.*, 138 S.W. 2d 520 (Tex. Sup. 1940); *Southwestern Telephone & Telegraph Co.* v. *City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915, error ref.). Constitutional and statutory provisions of this import reserve to the state the right to impose additional burdens on the exercise of a privilege, and a utility accepts a privilege upon the condition that additional burdens imposed by the state will be performed. *Hamilton Gaslight & Coke Co.* v. *City of Hamilton*, 146 U.S. 258 (1892); *Sioux City Street Ry. Co.* v. *Sioux City*, 138 U.S. 98 (1891). These authorities sustain the power of the Legislature of Texas to require a utility accepting the privilege of laying a pipeline across a state highway, as an incident of exercising the privilege, to assume the additional burden of casing its pipeline in right-of-way acquired for widening the highway.

In generously granting railroads and utilities the privilege to lay and maintain their facilities across public highways, the Legislature has exercised this power. Vernon's Ann. Civ. Stats., Articles 6320, 6327, 1436, 1436b and 1497.[12] These statutes impose the burden upon an accepting utility or railroad to adjust its lines, in or outside of the original bounds of a highway or stream, to conform to public improvements. It is arguable that the language of the utility statutes does not clearly state that a utility has the burden to adjust its lines for subsequent improvement or widening, but judicial construction of similar language in the railroad statutes removes the argument.

Articles 6320 and 6327 require railroads crossing a public highway or stream to restore the highway or stream "to its former state, or to such state as not to unnecessarily impair its usefulness", and to keep its roadbed across any highway "in a proper condition for the use of the travelling

[12] Appendix pp. 37, 34, 35.

public". Like the utility statutes, this language does not expressly require a railroad to adjust facilities outside of the original bounds of a highway or stream to conform to improvement or widening thereof, but "informed local courts" have found "meaning not discernable to the outsider". *Louisiana Power & Light Co.* v. *City of Thibodeaux*, 360 U.S. 25 (1959). The quoted language requires railroads to make such changes in their lines, in or outside of the bounds of the original highway or stream, as the state may require in improving or widening the public way. *Chicago R.I. & G. RR. Co.* v. *Tarrant County Water Control & Improvement District*, 73 S.W. 2d 55 (Tex. Sup. 1934); *Missouri K & T R. Co.* v. *Rockwall County Levee Improvement District*, 297 S.W. 206 (Tex. Sup. 1927); *Gulf C. & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897).

The similar language of the pipeline statutes has not been construed, but since the cases construing the railroad statutes were decided long prior to enactment of the utility statutes, their judicial construction "must be read into the analogous pipeline statutes". *Lone Star Gas Company* v. *State*, 153 S.W. 2d 681 (Tex. Sup. 1941); *Humble Pipe Line Co.* v. *State*, 2 S.W. 2d 1018 (Tex. Civ. App. 1928, error ref.).

The mandate of the Texas Constitution must be read into every statutory grant of a privilege, and compels the Texas Supreme Court to "read into the analogous pipeline statutes" the judicial construction of the railroad statutes that privileges granted are subject to the continuing duty of the railroad to adjust its lines for widening or improving of a highway. As judicially construed, the privilege of using the highways imposed (as a condition of the grant) the duty on Petitioner to make such adjustments as the

state might thereafter require in improving or widening the highway. Petitioner was not obligated to accept the privilege, but did so subject to the condition that it would comply with the requirement of the state for improving or widening the highway. When the Highway Department so requested, Petitioner had a legal duty to encase its pipelines in the widened areas.

Irrespective of the pipeline statutes, however, the Department had the power and duty to require the questioned encasement. Read in the light of the Texas Constitution, Vernon's Ann. Civ. Stats., Articles 6663, 6673, 6665, 6667, 6666, and 6674q-4 evidence a complete delegation of the power of the State to control state highways, with its attendant duty of exercising continued control over privileges and franchises to use highways. Under this delegated power and duty the Department required that all gas lines be cased from right-of-way line to right-of-way line (all of 186), and after Petitioner's acceptance of a permit under this regulation, requested encasement in the widened area. Such request was an exercise of the constitutionally reserved power; Petitioner owed a legal duty to comply with the request; and performance of this legal duty was not consideration for any alleged promise of Respondent to pay for its costs.

C. Petitioner's Encasement was the Performance of a Legal Duty in Response to the Exercise of the Police Power

Upon a record that "failed to disclose that Appellant's lines were the cause of serious damage to the public" *Panhandle Eastern Pipeline Company* v. *State Highway Commission*, 294 U.S. 613 (1935), declared that, in exercising the police power, pipelines are not upon the same footing

as railroads. This record shows that an unencased pipeline constitutes a definite hazard to vehicular traffic, the highway and the pipeline (R. 28, 59, 70, 97, 115 and 116). Recognizing the danger of explosion, with its consequent injury to persons, property and the highway, the Department requested Petitioner to make the additional encasement. Despite *Panhandle Eastern*, this is a proper basis for invoking the police power. This case has never been cited by this Court, and the change of conditions since 1935 may well be the reason for its lack of citation. Compared with today, the automobile industry was in its infancy in 1935, and while no question of public safety may have been apparent then, with the present vehicular traffic and roads and modern highways, the requirement of encasement is necessary to protect the public.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Hardin County, a member of the bar of the Supreme Court of the United States, certifies that a copy of the foregoing Brief in Opposition has been served upon Petitioner, Trunkline Gas Company, by delivering same to Mr. Cecil N. Cook, 1100 Esperson Building, Houston 2, Texas, counsel for Petitioner, in person, this ..... day of August, 1964.

.....

WILLIAM ROBERT SMITH

Counsel for Respondent